



**In re Estate of the Late Samuel Gatheru Mbugua (Deceased) (Succession Cause 3380 of 2014) [2024] KEHC 15212 (KLR) (Family) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15212 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**SUCCESSION CAUSE 3380 OF 2014**  
**SN RIECHI, J**  
**NOVEMBER 25, 2024**  
**IN THE MATTER OF THE ESTATE OF THE LATE**  
**SAMUEL GATHERU MBUGUA (DECEASED)**

**RULING**

1. This matter relates to Samuel Gatheru Mbugua (Deceased) who died on 20th January 2006. Following his demise a grant of letters of Administration was issued to Mary Mukami Mbugua, Elias Murage Mbugua, George Gatheru Mbugua and Elizabeth Wangui Mbugua and confirmed on the 13<sup>th</sup> March 2019. The confirmed grant was rectified on 7<sup>th</sup> February 2021 and further rectified on 3<sup>rd</sup> July 2014 and certificate of confirmed grant was issued to the administrators.
2. Consequently, the Applicant has filed an application dated 16<sup>th</sup> July 2024 seeking for orders for stay of execution of this court's judgment delivered on 3<sup>rd</sup> July 2024. The applicant in the application is seeking orders;
  - i. That pending the hearing and determination of the Application herein, this Honourable Court be pleased to grant a stay of execution of the Judgment entered herein on 3<sup>rd</sup> July, 2024.
  - ii. That pending the hearing and final determination of the Appeal, this Honourable Court be pleased to grant a stay of execution of the Judgment entered herein on 3<sup>rd</sup> July, 2024.
  - iii. That pending the hearing and final determination of the Application herein, the Honourable Court be pleased to issue an Order restraining the Respondent, heirs, agents, servants and or employees from interfering with the Estate of the Deceased.
  - iv. That the OCS Githunguri Police Station ensures strict compliance with the Orders granted by this Honourable Court; and
  - v. That costs of this Application be borne by the Respondent.
3. The application is premised on the following grounds;



1. That the Applicant is one of the Administrators and a beneficiary of the Estate of the late Samuel Gatheru Mbugua (hereinafter "the Deceased" pursuant to Certificate of Confirmation of Grant issued on the 7th day of February 2021 by Hon. Justice A.O Muchelule.
2. That the Honourable Court delivered its Judgment herein on 3<sup>rd</sup> July, 2024 entering Judgment in favour of Mary Mukami Mbugua, the Respondent herein by adopting her proposed mode of distribution to the Estate of the Deceased and neglecting to take into account the Applicant's proposed mode of distribution.
3. That the Honourable Court in its directions instructed the Applicant and the Respondent herein to file their proposed mode of distribution towards the Estate of the Deceased.
4. That the Applicant filed his mode of distribution to the Estate of the Deceased signed on 9th June, 2019 by all the surviving beneficiaries of the late Samuel Gatheru Mbugua namely: Margaret Njeri (deceased), Ann Nyambura Mbugua (deceased), Elizabeth Wangoi (deceased), George Gatheru Mbugua, Mary Mukami, Francisca Wanjiku Mbugua, Bernard Wanga, Angelica Wambui Mbugua, Simon Mwatha, William Njenga Mbugua, Gerald Noroge, Elias Murage Mbugua, Hellen Wairimu Mbugua Kahuku.
5. That on the other hand, the Respondent filed her proposed mode of distribution dated 13<sup>th</sup> December, 2022 which was supported by Seven (7) out of Eleven (11) Children and beneficiaries of the late Samuel Gatheru Mbugua.
6. That the Applicant disputed the mode of distribution proposed by the Respondent as the same was not consented to by all the family members whereas the Applicant's proposed mode of distribution of the Estate of the Deceased was consented to by all the beneficiaries of the late Samuel Gatheru Mbugua.
7. That surprisingly, the Honourable Court delivered its Judgment on 3<sup>rd</sup> July, 2024 distributing the Estate of the Deceased in accordance with the proposed mode of distribution by Mary Mukami Mbugua, the Respondent herein without acknowledging the Applicant's proposed mode of distribution which was consented to by all the beneficiaries of the Estate of the Deceased save the Deceased beneficiaries.
8. That it is important to emphasize that the proposed mode of distribution by the Respondent was only consented by Seven (7) out of the Eleven (11) beneficiaries whereas the Applicant's proposed mode of distribution was consented by all the surviving beneficiaries.
9. That it is the Applicant's plight that the consent adopted in this Honourable Court does not take into concerns the issues of all the beneficiaries but a percentage of them hence prejudicing those who did not consent to that mode of distribution.
10. That it is also important that this Honourable Court take cognizance of the fact that the same mode of distribution proposed by the Respondent was denied by Hon. Justice Muchelule in a Ruling delivered on 7<sup>th</sup> February, 2022.
11. That further, the Honourable Court directed that that a Report on the management of the Estate of the Deceased be hereby filed before this Court to determine the net assets and liabilities in the Estate.
12. That the Applicant filed the said Report which was attached as an annexure in the Applicants Application dated 25th June, 2024 specifically as Exhibit "GGM 5" in the Supporting Affidavit.



13. That the said Applicant's Application has not been heard nor determined yet the Report contains crucial information which the Court should take into account before making a decision on the mode of distribution of the Estate of the Deceased noting that the Estate currently has net liabilities of over Kenya Shillings Four Million (Kshs. 4, 000, 000/-) which the Applicant and his two brothers have been managing.
  14. That it is apparent that the Judgment delivered by the Honourable Court has failed to address and or take all necessary factors and information into concern before delivering the said decision and which the Applicant intends to Appeal.
  15. That the Applicant has requested the Deputy Registrar for a Certified Typed Copy of the Judgment and the Proceedings with the intention to appeal the whole Judgment.
  16. That it is apparent that the Respondent and or beneficiaries are likely to execute the beneficiaries herein at any time. resultant orders in respect of the Judgement entered against the Applicant.
  17. That if this Application is not heard expeditiously and the Orders sought granted, the Applicant and other beneficiaries shall suffer a complete violation of his rights as enshrined in the Kenyan Constitution and Statutory Law applicable in Kenya.
  18. That if a stay of execution is not granted the Applicant's appeal will be rendered nugatory and the Applicant together with some beneficiaries will be prejudiced and shall suffer irreparable damage.
  19. That it is in the interest of justice that status quo over the Estate of the Deceased be maintained.
4. The application is also supported by an affidavit sworn on 16<sup>th</sup> July 2024 in which the applicant briefly averred that he disputed the mode of distribution by the respondents as the same was not consented to by all family members and beneficiaries. The applicant averred that the mode of distribution proposed by respondents was denied by Justice Muchelule on 7<sup>th</sup> February 2022.
  5. The applicant averred that he intend to appeal against the judgement and it is apparent that the respondents are likely to execute the resultant orders in respect of the judgement.
  6. The applicant averred that he has an arguable appeal and that if the orders sought are not grant the applicant and beneficiaries shall suffer a complete violation of his rights as enshrined in the Constitution. The applicant averred that if a stay of execution is not granted the applicant's appeal will be rendered nugatory. The applicant averred that the status quo over estate of the deceased be maintained.
  7. In respondent the respondent Mary Mukami Mbugua did not file a response to the application.
  8. By consent of parties, the application was canvassed by way of written submissions. The applicant filed written submissions dated 25<sup>th</sup> October 2024 in person while the respondent from the evidence on record opted not to file written submissions.
  9. The applicant briefly submitted that there is a threat of execution of judgement and resultant orders, dispossession, actual intermeddling which are illegal acts infringing on applicant who seeks to file an appeal.
  10. The applicant submitted that if orders sought are not granted then the orders of this court shall be executed robbing the applicant his legal, beneficial and constitutional rights. The applicant submitted that unless a restraining order is issued and a stay of execution of the judgement arising from judgement



delivered on 3<sup>rd</sup> July 2024 pending appeal the applicant shall suffer substantial and irreparable damage and appeal shall be rendered nugatory.

11. The applicant relied on the following authorities where stay of execution was considered: *Equity Bank(K) Limited v Jackline Ayot Mbogo*[2019]Eklr, *American Cyanamid v Ethicon Limited*[1975]AC 396 and *Niaz Mohamed v Commissioner for Lands and 4 Others*[1996]Eklr
12. From the application, affidavit and submissions the main issues arising for determination are:
  - i. Whether or not this court should grant the order of stay of execution of the judgement delivered on 3<sup>rd</sup> July 2024 pending appeal.
  - ii. Whether or not this court should issue restraining orders restraining the respondent and or her agents from interfering with the estate of the deceased.
13. The applicant was aggrieved by the finding of the learned judge and filed an in judgement delivered on 3<sup>rd</sup> July 2024, which the appeal intend to file an appeal against the judgement.
14. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the *Civil Procedure Rules* which requires an applicant seeking a stay of execution pending appeal to demonstrate that -
  - (a) Substantial loss may result to the applicant unless the order was made;
  - (b) The application was made without unreasonable delay; and
  - (c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.
15. A stay of execution should only be granted where sufficient cause is shown. A stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules*.
16. A Grant of stay of execution pending appeal is a discretion of the court. In *Butt v Rent Restriction Tribunal* (1982) KLR the court gave guidance on how such discretion should be exercised and held that –
  - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
17. It has to be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW vs. EKW* [2019] eKLR, it was observed that:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
18. The above are the principles to bear in mind in determining the application. The first consideration is whether the application was filed timeously. The judgment of the High Court in this matter was delivered on the 3<sup>RD</sup> July 2024 24<sup>th</sup> and the Applicant has filed this instant application on 16<sup>th</sup> July 2024. In my view, this application was filed without inordinate delay.
19. The applicant contends that he will suffer substantial loss if the orders sought are not granted as the respondent will proceed to act on the orders issued on 3<sup>rd</sup> July 2017. The applicant has submitted that he has an arguable appeal with high probability of success.
20. It is the duty of the applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63 the Court of appeal considered as to what amounts to substantial loss and held that –
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
21. I have perused the court record and I note that the applicant herein has not file a notice of appeal that would enable this court determine whether he has arguable appeal which he intend to appeal. The applicant has not established that she will suffer any substantial loss, if the orders sought are not granted.
22. The other consideration is security. In the case of *Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR the court held that:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment



is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

23. The applicant in this matter has not offered any security in the event that the appeal fails. The condition of security has therefore not been met.
24. Having found the 1<sup>st</sup> issue in the negative I find no reason to delve into other 2<sup>nd</sup> issue.
25. The upshot is that there is no merit in the application. The same is thereby dismissed with no costs.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2024**

.....

**S. N. RIECHI**

**JUDGE**

